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No. 94-329

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,
v.
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF INTERCOLLEGIATE STUDIES INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Intercollegiate Studies Institute ("ISI") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari. Consent to file this brief has been obtained from counsel for petitioners, but counsel for respondents have declined to consent. Correspondence reflecting the respective positions of the parties has been filed with the Clerk.

The petition seeks review of the determination by the United States Court of Appeals for the Fourth Circuit that the Establishment Clause of the First Amendment not only permits, but virtually compels, the University of Virginia to abridge the free speech rights of a student group duly established in accordance with University guidelines

by excluding it from sharing in the disbursement of pooled student fees collected to fund student activities. As a nationally prominent student-oriented organization, ISI has a compelling interest and commensurate ability to address the important Free Speech and Establishment Clause issues raised in this case from the perspective of the thousands of college and university students and faculty who, in a multitude of contexts, are more broadly affected by the discretion of university administrators and committees, which may restrict controversial political, religious, and philosophical expression by university students.

ISI is a nonprofit, nonpartisan, tax-exempt educational organization founded in 1953 to instill among college students a better understanding of the values and institutions that sustain a free society, and to nurture in these future leaders an allegiance to the American ideal of ordered liberty. To accomplish this goal, ISI acts to deepen student appreciation of our Nation's founding principles of limited government, individual liberty, personal responsibility, free enterprise, and moral standards.

ISI maintains a network of over fifty thousand members and volunteer representatives that embraces virtually every college campus in the United States. Through its integrated program of lectures, conferences, publications, and fellowships, ISI annually reaches hundreds of thousands of students and faculty throughout the United States through ISI-sponsored activities. Over twenty-five hundred ISI student representatives and faculty associates annually assist in the dissemination of ISI publications and organization of ISI activities on more than one thousand college campuses.

ISI sponsors approximately forty conferences each year, including four regional leadership conferences and two summer schools. Also, to introduce students to the ideals of liberty, ISI regularly brings noted speakers to college and preparatory school campuses. Through this ambitious lecture program, ISI sponsors over three hundred lectures annually. However, ISI's sponsorship of these lectures is dependent upon ISI's ability to receive partial subsidization from the schools to cover the costs of the speakers' fees. Frequently, ISI is unable to sponsor a particular lecture because a school or university refuses to subsidize the lecture based on the religious or political views of the speaker.*

ISI publishes four journals and other publications with more than 850,000 copies distributed annually, including *The Intercollegiate Review*, ISI's flagship journal, and *CAMPUS: America's Student Newspaper*, written entirely by college students. In addition, ISI publishes *Modern Age*, a quarterly forum for preeminent thinkers, and *The Political Science Reviewer*, an annual review of scholarship. ISI also publishes books by leading scholars and authors and other text and reprints. Finally, ISI annually awards tuition and stipend fellowships to graduate students committed to perpetuating our Nation's heritage by teaching liberal arts at the undergraduate level. These fellowships have created an active network of some four hundred educators and intellectual leaders at campuses throughout the country.

The fundamental issue presented by the petition—the right of a student group to participate in a general funding program sponsored by a state university free of viewpoint-based discrimination—is of paramount importance to ISI, its student and faculty members and its many supporters. Academic freedom at colleges and universities is not merely a central tenet of ISI's philosophy but also a necessary ingredient for its propagation. Official university decisionmaking that restricts student free speech on

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*** Ironically, many schools will refuse to fund a lecture by a religious speaker while funding a secular speaker who addresses an identical topic. For example, most schools would refuse to subsidize a speech by a representative of the National Catholic Conference regarding the abortion controversy, but would subsidize a representative of the National Organization of Women addressing the same subject.**

admittedly viewpoint-based grounds, like the decision of the University of Virginia at issue here, is anathema to ISI and those students and professors who take part in its varied programs and activities.

For the foregoing reasons, the motion by ISI for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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September 21, 1994

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BRIEF FOR THE INTERCOLLEGIATE STUDIES INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

Amicus Intercollegiate Studies Institute ("ISI") supports the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. ISI's interests in this case are set forth in the Motion that precedes this brief and are not reiterated in detail here. In sum, however, the court of appeals' judgment that the

University of Virginia may withhold funds from a single student organization solely on account of the perspective the students espouse is of grave concern to ISI. As an organization that represents thousands of students on campuses nationwide and as a sponsor of lectures, conferences, publications, and other fora in which students and other members of the university community are encouraged to express their viewpoints on a wide range of topics of interest to campus communities, ISI urges this Court to grant certiorari to address the substantial constitutional questions raised in this case.

REASONS FOR GRANTING THE WRIT

This case presents fundamental questions concerning the interplay of the core constitutional rights guaranteed by the Free Speech and Establishment Clauses of the First Amendment. The court of appeals sanctioned the abridgement of free speech rights in a setting that this Court has recognized as "peculiarly the 'marketplace of ideas' " and especially deserving of First Amendment solicitude—the public university campus. *Healy v. James*, 408 U.S. 169, 180 (1972). The decision below, moreover, addresses an issue of nationwide import because it deals with a university activity that is commonplace—the funding, through mandatory student fees, of various college-related, student-initiated functions.

Petitioners challenge the constitutionality of the University of Virginia's guidelines ("the Policy") for the distribution of monies from the University's Student Activities Fund ("SAF" or "the Fund"). The University collects a mandatory student activities fee from all students, deposits the fees into the Fund, and then, via approval of the University's Student Council, disburses the monies to support "the wide variety of student organizations, activities, and publications that function at the University." Pet. App. 2a.[1] Funds do not go directly to

[1] "Pet. App." citations are to the appendices to the petition for a writ of certiorari.

student organizations but rather are used only to reimburse expenses incurred by those organizations. Pet. App. 4a.

Petitioners—a group of University students—formed Wide Awake Productions. This student organization publishes *Wide Awake*, a magazine designed to facilitate "philosophical and religious expression" on campus. Pet. App. 5a. During the 1990-91 academic year, the University funded fifteen student publications that promoted diverse viewpoints, Pet. App. 4a & n.3,[2] but denied Wide Awake Productions' request for reimbursement of the expenses the students incurred in printing *Wide Awake*. The University admittedly singled out Wide Awake Productions for discriminatory treatment because the Policy broadly forbids the allocation of funds to "religious activities." Pet. App. 3a-4a.

The United States Court of Appeals for the Fourth Circuit correctly ruled that the Policy violated the petitioners' First Amendment free speech rights. Under the Policy, according to the court of appeals, "religious expression . . . is never allowed to compete for funds with other forms of speech that might be indulged by University students." Pet. App. 24a. Despite the conspicuous Free Speech Clause violation, the court of appeals found that the University's discriminatory treatment of petitioners was "justifie[d]" by the Establishment Clause. Pet. App. 38a. According to the court, reimbursement of *Wide Awake*'s printing costs would have the "primary effect" of advancing religion and would cause excessive entanglement between the State and religion. Pet. App. 34a-38a. Having found that the University's Establishment Clause fears justified the abridgement of free speech rights, the court of appeals rejected petitioners' challenge

[2] In addition, over 100 student organizations, including the Muslim Students Association and the Jewish Law Students Association, also obtained expense reimbursement from the Fund during the relevant time period. Pet. App. 4a.

under 42 U.S.C. § 1983 that the Policy was unconstitutional.

Under our Constitution, state-endorsed hostility toward a particular form of student-initiated expression engendered by the University's Policy and sanctioned by the court of appeals has no place on our public campuses. *Amicus* ISI therefore supports the petitioners in urging that this Court grant certiorari and reverse the judgment of the court of appeals.

I. THE COURT OF APPEALS' DECISION HAS NATIONWIDE IMPORTANCE BECAUSE PUBLIC COLLEGES AND UNIVERSITIES COMMONLY DISTRIBUTE FUNDS TO STUDENT GROUPS AND MUST OBEY THE FIRST AMENDMENT IN DOING SO.

1. Public colleges and universities have long been recognized as fortresses of the First Amendment, where the right of free speech is carefully protected to ensure an atmosphere conducive to the free exchange of information and ideas. *E.g., Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (holding that the right to receive information and ideas is " 'nowhere more vital' than in our schools and universities"). This open atmosphere not only contributes to the learning process but is a necessary part of learning itself. As the Court has noted, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

When a student enrolls in a public college or university, he does not check his constitutional rights at the ivy-covered gate. The right of free speech, unfettered by viewpoint-discriminatory regulation, extends to all students. *Healy*, 408 U.S. at 180 ("[S]tate colleges and

universities are not enclaves immune from the sweep of the First Amendment."). Any restrictions on this right are subject to strict scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *see also Bishop v. Aronov*, 732 F. Supp. 1562, 1565 (N.D. Ala. 1990), *rev'd on other grounds*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 302 (1992).

Because the Nation's secondary schools and universities are cornerstones of learning and discourse, the very essence of First Amendment freedom, this Court has historically shown great solicitude in granting certiorari to vindicate the rights of students engaged in real or symbolic speech. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *West Virgina State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Indeed, in *Widmar* this Court explicitly bespoke the "special constitutional solicitude" owed to the First Amendment rights of students. 454 U.S. at 276. More recently, the beneficiaries of this solicitude have been students attending secondary schools and universities who have rightfully sought equal entitlement to benefits generally available to the student body, but who have been denied such benefits out of a purported desire to avoid an Establishment Clause violation. This Court has readily granted certiorari to rectify such injustice. *Widmar*, 454 U.S. 263; *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

Because free speech is necessary for the proper education of our Nation's students and because the Constitution jealously protects such speech, the court of appeals' decision, which severely limits the protection afforded to student-initiated religious expression on university campuses, is deeply troubling. The Court should grant certiorari and address the important issues raised in this case.

2. The role of religious expression in student-funded activities presents a commonplace and nationwide issue. The collection of mandatory student activities fees that are then distributed to eligible student groups to promote diverse causes is a commonplace university activity. Like the University of Virginia, however, many public colleges broadly discriminate against all religious viewpoints by refusing to disburse monies from their student activities funds to otherwise-eligible student groups that wish to engage in religious speech or publication. Public college campuses have in recent years proven a fertile field for conflict between student groups that seek to espouse religious—or, more broadly, "politically incorrect"—viewpoints on the one hand and university administrators, student councils, or other organizations that exercise discretion in distributing student activities funds.

Recent events on the campus of the Metropolitan State College in Denver provide but one example. A campus group there recently sought funding for a program that would express a Catholic perspective on human sexuality. The program was designed as a rebuttal to an anti-Catholic program that had been funded by the school. Choosing to discriminate against speech defending religious ideals, the school refused to provide funding, citing considerations of "diversity and separation of church and state."[3] *See also Tipton v. University of Hawaii*, 15 F.3d 922, 926 (9th Cir. 1994) (rejecting facial challenge to policy of the University of Hawaii student organization that prohibited reimbursement of funds to religious activities, but not deciding whether the University could "outright refuse to fund all student religious organizations while funding the activities of other student groups").

An informal survey conducted by counsel for ISI demonstrates that discrimination on our campuses against

[3] Unlike the University of Virginia, Metropolitan State College later retreated from this discriminatory position. *See Catalyst, Journal of the Catholic League for Religious and Civil Rights*, July-Aug. 1994, at 2.

religious viewpoints is widespread. Representatives from several public colleges and universities contacted in the survey stated that their schools, like the University of Virginia, would not provide funding from their student activities funds to a student group that wished to publish a "Christian perspective" magazine because such conduct would constitute "religious activity."[4]

ISI's survey also reveals that the policies of our Nation's public colleges and universities are far from uniform in terms of providing student activity funds to students who engage in religious expression. Representatives from other schools surveyed stated that they would provide such funding to a religiously oriented student group so long as the group did not maintain exclusionary membership criteria.[5] Accordingly, while some university policies are in accord with the court of appeals' decision in that they discriminate against religious activities, other schools have reached a contrary legal conclusion and do not feel compelled, as did the University of Virginia, to discriminate against religious speech out of concern for the Establishment Clause.

Almost six million students are enrolled in our Nation's public colleges and universities[6] and are affected by the

[4] These schools included Arizona State University; George Mason University; Northern Arizona University; Towson State University; the University of Arizona; the University of California, Berkeley; the University of California, Davis; the University of Delaware; the University of Georgia; the University of Hawaii, Manoa; the University of Maryland; and the University of South Carolina.

[5] These schools included the University of Alaska, the University of Connecticut, and the University of Florida. The University of Connecticut has provided funding to the Christian Fellowship Club. Similarly, the University of Florida has provided funding to the Campus Crusade for Christ, the Jewish Student Union, a gospel choir, and an organization of African-American Christians. University of Florida Student Body Law 94-109.

[6] American Ass'n of State Colleges and Univ. & Nat'l Ass'n of State Univ. & Land-Grant Colleges, *Enrollment at Public Four-*

disparate student activities fund policies now in place. Because of the nationwide importance of the issues raised in this case, the Court should determine the validity of the court of appeals' interpretation of the First Amendment.

II. THE COURT OF APPEALS' ERRONEOUS RESOLUTION OF A CONFLICT BETWEEN THE FUNDAMENTAL GUARANTEES OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT MERIT REVIEW BY THIS COURT.

The court of appeals found that the University's Policy failed to ensure neutrality toward religious speech and instead created an "uneven playing field" that discriminated against religious speech and gave the advantage toward "wholly secular modes of expression." Pet. App. 26a. "In reaching and forbidding funding for speech that meets the definition of 'religious activity,' but not for speech of other types, the SAF guidelines discriminate among speech on the basis of its content." *Id.* The court of appeals thus found that the University's discrimination against religious speech "violates the Speech and Press Clause" of the First Amendment. Pet. App. 34a.

The court of appeals then charted a course that this Court has never taken: the court held that the abridgement of petitioners' Free Speech and Press Clause rights accomplished by the University's discrimination against religious speech was "justified" by the University's fear of an Establishment Clause violation. Pet. App. 38a. Relying on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the University argued in its defense that a policy that did not exclude "religious activities" from the pool of funds—*i.e.*, a policy neutral toward religious activity—would have caused it to work "an establishment of religion" on

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Year Colleges and Universities (1994) (stating that 5.78 million students enrolled in public four-year colleges and universities in 1993).

campus. The court of appeals agreed, finding that a broad funding exclusion for all "religious activity" was necessary to avoid an establishment of religion. Pet. App. 38a-39a.

1. This Court should grant certiorari because the decision of the court of appeals presents a fundamental constitutional issue that this Court has yet to address: whether, and if so, under what circumstances, Establishment Clause concerns "trump" the guarantees of the Free Speech and Press Clause. This Court has at least twice explicitly left open this fundamental issue. In *Widmar v. Vincent*, the Court readily determined that a state university had violated its students' First Amendment rights of free speech and association by excluding them from using otherwise available facilities for purposes of religious worship or discussion. 454 U.S. at 267-77. The Court rejected the university's argument that a bar against religious activity was necessary to satisfy the Establishment Clause, and therefore did not "reach the questions that would arise if . . . free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." *Id.* at 273 n.13.[7] In *Mergens*, the Court likewise rejected an Establishment Clause defense to the use of high school facilities for student-initiated religious activities and did not decide the students' free speech claims. 496 U.S. at 253. Having reserved the issue, the Court should now address it. *See Mueller v. Allen*, 463 U.S. 388, 390-91 (1983) (granting certiorari because the Court had previously reserved judgment on the question presented).[8]

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[7] The Court in *Widmar* "agree[d] that the interest of [a] University in complying with its constitutional obligations may be characterized as compelling" for purposes of determining whether the school had a sufficient interest to defeat the students' free speech rights. 454 U.S. at 271; *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (discussing this aspect of *Widmar*).

[8] This Court's crèche cases also fail to offer guidance in this area. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court found

The conflict presented by the holding below is "a constitutional conflict of the highest order." *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 557 (3d Cir. 1984) (addressing clash between students' free speech rights and Establishment Clause concerns), *vacated on jurisdictional grounds and remanded*, 475 U.S. 534 (1986). As one commentator recently noted: "If students and teachers have a protected right of freedom of religious speech and the state's compelling interest is avoiding an establishment of religion, the resulting constitutional conflict is of paramount significance." D. Grant Carwile, Note, *When Freedom of Speech in the Classroom Conflicts with the Establishment Clause: Bishop v. Aronov*, 14 U. Ark. L.J. 83, 96 (1991).[9]

The lower courts have noted the need for direction from the Court in this sphere. In *Bender*, for example, the court of appeals stated that the courts have been

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no Establishment Clause violation and accordingly did not address any conflict with free speech rights. In *County of Allegheny v. American Civil Liberties Union*, the Court found that the crèche violated the Establishment Clause, but it was not in a public forum. 492 U.S. 573, 600 n.50 (1989); *see also* Daniel Parish, *Private Religious Displays in Public Fora*, 61 U. Chi. L. Rev. 253, 253-54 (1994) (footnotes omitted):

> Private religious displays in public fora present a legal and philosophical quandary. On the one hand, the Free Speech Clause generally prohibits content-based restrictions on private expression in the public forum. . . . On the other hand, the Establishment Clause requires that the government not endorse one religion over another or religion over irreligion. When the government appears to sponsor religion by allowing private religious expression in a public forum the doctrines collide.

[9] The commentator added:

> Is the Establishment Clause to be placed in a position of permanent supremacy over the Free Speech Clause? Should free speech rights always take precedence? Should these determinations be made on a case-by-case basis with a careful weighing of the competing interests under the facts and circumstances of each case? As recently as 1990, the Court has declined to resolve these issues.

Carwile, *supra*, at 96-97 (citing *Mergens*) (footnotes omitted).

"left with no definitive guidance from the [Supreme] Court as to the proper direction to take in th[e] unique circumstance" where rights guaranteed by the Free Speech and Establishment Clauses collide. 741 F.2d at 557. Similarly, in *Smith v. County of Albemarle*, 895 F.2d 953, 961 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990), where the majority held that Establishment Clause concerns justified content-discriminatory speech restrictions, the dissent noted the "absence of a mandate from the Supreme Court on the 'head-to-head' clash of these two competing First Amendment rights." Another commentator has noted: "Due to the lack of guidance from the Supreme Court, lower courts addressing the conflict between the Free Speech and Establishment Clauses have had to struggle in their attempt to arrive at an appropriate resolution of the issue." Raymond W. Mitchell, *A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause*, 23 Loy. U. Chi. L.J. 867, 878 (1992).

In conflict with the decision below, other courts have refused to accord preference to the Establishment Clause. For example, in *Doe v. Small*, 964 F.2d 611, 618-19 (7th Cir. 1992) (en banc), the majority held that the Establishment Clause "was an insufficient interest to justify a content-based exclusion" of speech in the form of religious artwork from a public park. The concurring opinion emphasized that the Constitution "neither creates nor tolerates" a "rule" that government must cure Establishment Clause violations by abridging the right of individuals to engage in religious speech. *Id.* at 629 (Easterbrook, J., concurring). In *Bender*, the court of appeals noted that *Widmar* did not hold that the Establishment Clause would automatically override free speech. 741 F.2d at 558. "Such a holding," continued the court, "would place the Establishment Clause in a position of permanent supremacy over the free speech clause, a constitutional hierarchy which we do not think the Framers intended." *Id.* The court nevertheless decided

that Establishment Clause concerns outweighed free speech interests in the specific facts of the case. *Cf. Carey v. Brown*, 447 U.S. 455, 467 (1980) (stating that protection for public speech "has always rested on the highest rung of the hierarchy of First Amendment values").

Recent commentary highlights the sharply divisive views of the free speech-disestablishment conflict. First Amendment scholar John Whitehead contends that "religious expression is a preferred first amendment right and cannot be contravened by any establishment clause concerns." John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 Pepp. L. Rev. 229, 231 (1989). Professor Laycock notes that " 'secularists' tend to think that the need for disestablishment takes precedence over free speech and free exercise rights in substantially all cases of conflict." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 7 (1986). In defending the federal Equal Access Act, *see Mergens*, Laycock argues that "[b]arring discrimination against religious speech is . . . consistent with the establishment clause" because it furthers government neutrality toward religion. *Id.* at 22.

2. The clash between Free Speech and Establishment Clause guarantees is nowhere more evident, or troublesome, than in the educational arena, as the decision below confirms. *E.g.*, Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking*, 24 N.M. L. Rev. 1, 1 (1994): "[T]he intersection of the Religion and Speech Clauses of the First Amendment has become increasingly controversial, particularly in the context of public schooling."

For example, in *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir.), *cert denied*, 113 S. Ct. 2344 (1993), the court of appeals overturned a school district's long-established practice to permit the Gideons to dis-

tribute Bibles on school property. When the school district in its defense noted that other groups had been permitted to address students, the court ruled that in the public school context the Establishment Clause "automatically trumps" the First Amendment interest in free expression. *Id.* at 1166-68. Religious expressive activity, according to the court, "may be stifled in the government's vigilance to remain neutral toward religion." *Id.* at 1168.

The Ninth Circuit likewise recently ruled that a school district's interest in avoiding an Establishment Clause violation "trumps" a teacher's right to exercise free speech. *Peloza v. Capistrano Unified Sch. Dist.*, Nos. 92-55228, 92-55644, 1994 WL 382635, at *4 (9th Cir. July 25, 1994). As with almost all circuit court decisions addressing the colliding First Amendment values, however, the court of appeals panel was itself divided on this important question. Judge Poole dissented from the majority's holding that the Establishment Clause justified a gag on free speech rights, emphasizing that "[w]e must . . . remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others." *Id.* at *9 (Poole, J., dissenting in part).

In contrast, the Court of Appeals for the Eighth Circuit in *Good News/Good Sports Club v. School Dist of the City of Ladue*, No. 93-2148, 1994 WL 328572, at *8 (8th Cir. July 12, 1994) (to be published at 28 F.3d 1501), concluded that a school policy of viewpoint discrimination violated the Free Speech Clause and rejected the school's Establishment Clause defense. The goal of the *Good News* Club was to foster the moral development of junior high school students from the perspective of Christian religious values. *Id.* at *1. While the school originally had a neutral policy, it amended the policy to close the school district to all community groups expect athletic and Scout groups in the weekday afternoon hours during which the Club previously had

met. The amended policy also provided that the Scouts' meetings "shall not include any speech or activity involving religion or religious beliefs." *Id.* at *2. The Eighth Circuit agreed with the Club that the amended policy was impermissible as viewpoint-discriminatory. The Scout groups and the Club engaged in "exactly the same category of speech"—the moral and character development of the students, *id.* at *4—and the amended policy impermissibly permitted the Scouts to express their perspective on the subject while prohibiting the Club's religious viewpoint. *Id.* at *5 (citing *Lamb's Chapel*). Unlike the decision below, the Eighth Circuit rejected the school district's Establishment Clause defense.[10]

3. This Court should grant review of this case to ensure that the Establishment Clause is not improperly—or excessively—applied in a way that erodes free speech rights. The court of appeals' ready acceptance of the premise that the Establishment Clause supersedes, and serves as a barrier to, the religious speech of students creates a risk that disestablishment will be employed as an instrument by those who are intolerant of such speech. *See Doe v. Village of Crestwood*, 917 F.2d 1476, 1494 (7th Cir. 1990) (Coffey, J., dissenting) ("The Establishment Clause of the First Amendment was never intended to be used as a sword to suppress and stifle the religious practices or beliefs of American citizens."), *cert. denied*, 112 S. Ct. 3025 (1992). *See also* Whitehead, *supra*, at 237 ("Giving establishment interests precedence over free exercise interests creates a bludgeoning effect in that the establishment clause becomes a weapon to repress free speech and exercise rights."); Laycock, *supra*, at 27 (noting that improperly expansive application of the Establishment Clause "has been the basis of repeated efforts to censor religiously motivated speech. . . . [T]he free speech rights of religious citizens are denied in the name of separation of church and state.").

[10] *See also Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280 (E.D. Pa. 1991) (noting that "[a]djustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing" and holding that the Establishment Clause did not justify a ban on a high school student's right to distribute literature).

Cognizant that excessive application of the Establishment Clause endangers free speech, judges and commentators alike have advocated that the Establishment Clause not be used to defeat free speech rights absent concrete injuries of the sort the Establishment Clause was designed to avert. For example, dissenting in *Village of Crestwood*, Judge Coffey stated: "I believe it is time for the judiciary to rethink our First Amendment jurisprudence and return to harms capable of concrete definition and objective analysis, before claims are recognized, as we do in every other area of law." 917 F.2d at 1491. Similarly, while concurring with the holding in *Washegesic v. Bloomingdale Pub. Sch.*, that a public school must remove from its hallway a portrait of Jesus Christ, Judge Guy warned against the "establish[ment] of a class of 'eggshell plaintiffs' of a delicacy never before known to the law. I can well understand that someone . . . in some sense could be offended by this portrait, but 'injured' is another matter." No. 93-1248, 1994 WL 475999 (6th Cir. Sept. 6, 1994), at *4.[11] One commentator advocates "a more realistic balancing of the competing constitutional values" by replacing a presumed infringement, such as the presumption that students are impressionable and will perceive state sponsorship in a given activity, "with a concrete evidentiary standard" that requires proof of a material and substantial injury before student speech may be restricted. D. Jarrett Arp, *Beyond Mergens: Balancing a Student's Free Speech Right Against the Establishment Clause in Public High School Equal Access Cases*, 32 Wm. & Mary L. Rev. 127, 158-59 (1990). Another

[11] *See also Roberts v. Madigan*, 921 F.2d 1047, 1060-63 (10th Cir. 1990) (Barrett, J., dissenting) (emphasizing that Establishment Clause violations should be based on actual findings of improper religious indoctrination, not on mere speculation).

writer urges that "[c]ourts should weigh in the balance the particularized governmental interests that are actually at stake rather than abstract or hypothetical interests such as the potential dangers of public unrest." Salomone, *supra*, at 24. The court of appeals addressed none of these compelling concerns in its "balancing" of First Amendment freedoms.

Absent instruction from this Court, public universities, like the University of Virginia, will maintain, promulgate, or perhaps expand policies that, with wide sweep, discriminate against student-initiated speech solely because the viewpoints expressed are rooted in religious ideals. The University's Policy, and the court of appeals' ruling, are based on the premise that some students or faculty might perceive the sharing of funds by organizations that support religious speech as state sponsorship of religion, but this concern seems amply negated by existing University proclamations that funding "should not be misinterpreted as meaning that . . . the University approves of the organizations' goals or activities." Pet. App. 2a-3a. Further, the court had before it no empirical evidence of "establishment." *Cf. Widmar*, 454 U.S. at 275 (noting absence of empirical evidence that religious groups would dominate an open forum). At a minimum, the court of appeals' elevation of ephemeral or illusory Establishment Clause concerns to justify ongoing and actual free speech abridgment not only curtails the free speech rights of the *Wide Awake* students, but also creates a chilling effect on the exercise of student free speech, particularly religious speech, nationwide.[12] This Court should grant review to

[12] There are many who would prefer that religious perspectives be silenced even in the most important political debate. For example, when a Catholic organization argued that health care reform legislation should not encompass abortions, Representative Donald Edwards (D-Cal.) did not conceal the fact that he "resent[ed] that certain religious groups are entering this political fight." *Abortion Issue Divides Health Care Support*, Wash. Post, July 14, 1994, at A4. *See generally* Laycock, *supra*, at 27:

> [W]hen Catholic bishops speak out on abortion, nuclear weapons, economic redistribution, and peace in Central America, . . . someone on the other side of the political issue is sure to charge that these attempts to influence public policy violate separation of church and state. A moment's reflection on free speech and free exercise reveals the absurdity of that charge . . . .

devise an appropriate analysis for resolving Free Speech-Establishment Clause conflicts, and this case presents the Court with the opportunity to do so in the context in which these competing interests most often collide—the public education setting.

III. THE COURT OF APPEALS' ANALYSIS OF THE UNIVERSITY'S ESTABLISHMENT CLAUSE "DEFENSE" RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES THAT MERIT REVIEW BY THIS COURT.

1. This Court should grant certiorari in this case because close supervision of the Establishment Clause jurisprudence being developed by the lower courts is required. As this Court has stated, interpretation of the Establishment Clause does not lend itself to a "fixed, per se rule." *Lynch*, 465 U.S. at 678. Instead, the "line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 678-79. The Court has often noted as well that Establishment Clause cases present "especially difficult questions of interpretation and application," *Mueller*, 463 U.S. at 392, in an "extraordinarily sensitive area of constitutional law." *Lemon*, 403 U.S. at 612. Because the Court's jurisprudence in this extraordinarily important area "is of necessity one of line-drawing," *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992), "characterized by few absolutes," *Grand Rapids*

Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985), the Court should grant certiorari to guide the lower courts in addressing university policies that abridge religious speech.

2. In assuming that the threat of an Establishment Clause violation would present a state interest so compelling as to justify the abridgement of students' rights to be free of viewpoint-based discrimination, the court of appeals paid little heed to the fact that the speech abridged in this case was that occurring on a university campus—peculiarly the supposed marketplace of ideas. Addressing the "primary effect" prong of the *Lemon v. Kurtzman* test, the court concluded that nondiscriminatory funding of student activities, including funding of *Wide Awake*, would amount to "state sponsorship . . . of religious belief." Pet. App. 35a. Universities, however, are expected to tolerate and encourage broadly diverse viewpoints, and a reasonable student body and faculty would not interpret every act of tolerance as "sponsorship" of student-authored beliefs. "[O]ur nation's universities preserve a longstanding tradition of tolerating and even *encouraging the propagation* of all sorts of disbelieved opinions." *Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir.) (emphasis added), *cert. denied*, 113 S. Ct. 300 (1992). That, indeed, is the justification for collecting and disbursing student activities fees:

> One of the arguments used to justify allocation of activities fees to speakers or campus organizations that present controversial views is the educational necessity of exposing the university community to a diversity of responsible opinion. In fulfilling its role, it is expected that a university will strive for balance and afford adequate opportunity for opposing viewpoints.

Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

Viewpoints advanced solely via student-initiated speech, unedited and uncensored by the university, simply cannot be considered tantamount to "state sponsorship" of the

students' views. "While exposure to only a single point of view might indoctrinate rather than educate, exposure to debate between opposing viewpoints is educational and does not imply that a particular point of view is correct." Carolyn Wiggin, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009, 2107 (1994). This is true even if the expression of those views is furthered by a neutral funding scheme:

> Just as banning speech according to content within a public forum defeats the goal of allowing students to speak—and listeners to be exposed to speech—on representative viewpoints regarding topics of the day, selectively withholding funds from groups based on the viewpoint or content of their speech skews debate within the forum.

Id. at 2026-27.

The court of appeals likewise disregarded the university setting of this case and the particularly compelling free speech guarantees extant here when it addressed the third of *Lemon*'s prongs—that which prohibits excessive entanglement between church and state. The court feared that permitting the neutral distribution of funds to *Wide Awake* would create "the potential for seriously divisive political consequences at the University of Virginia." Pet. App. 37a. Our college campuses, however, are the primary locus for controversial speech. *E.g., Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) ("[F]ree speech is at the heart of teaching and universities by definition support speech—often extremely controversial speech."), *cert. denied*, 113 S. Ct. 1067 (1993). "Political divisiveness"—or more accurately in this case, a fear of possible divisiveness—cannot justify the abridgement of college students' free speech rights.

Further, the court failed fully to respect this Court's repeated admonitions that incidental benefits to religion do not create an establishment of religion. The University's Policy, were it neutral toward religion, would per-

mit the distribution of Fund monies to the printers of *Wide Awake*, not directly to the student group—just as monies are made available to reimburse the publication of myriad other student-led publications on campus. The funds would not aid any religious institution or establishment, but would assist a student group in espousing its perspectives by permitting it to share equally in a resource —the Fund—designed particularly for that purpose.

In any event, the court of appeals' fear that incidental funding through the reimbursement to the printers of *Wide Awake* would create "excessive entanglement" with religion conflicts with this Court's decision in *Widmar*. *Widmar* establishes that a university policy that is neutral toward and does not discriminate against religious speech "would avoid entanglement with religion." 454 U.S. at 271-72. Entanglement, after all, is "essentially a procedural problem." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976). This prong is offended only by " 'comprehensive, discriminating, and continuing state surveillance' " of religious activity. *Mueller*, 463 U.S. at 403 (quoting *Lemon*, 403 U.S. at 619). A policy that treats religious speech like all other speech would not entangle the affairs of Virginia with the affairs of religious establishments.

CONCLUSION

For the foregoing reasons, *amicus* ISI urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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